Supreme Court, U.S.
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No. 00-1441

In The

Supreme Court of the United States

RAY MILTON PENNINGTON, III,

Petitioner,

v.

TOWN OF FRONT ROYAL, VIRGINIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeals Of Virginia

BRIEF IN OPPOSITION

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STATEMENT OF FACTS AND NATURE OF THE CASE

Respondent amplifies Petitioner's statement as follows:

On October 10, 1997, shortly after 2:00 a.m., Officer Charles Robinson of the Front Royal Police Department was conducting a business check at the Grape Vine Restaurant/Texas Spirit Saloon when he observed a pickup truck driving slowly on Commerce Avenue (Rt. 522) [Transcript of the trial (hereinafter "TR"), p. 57, *Appendix submitted to the Court of Appeals of Virginia (hereinafter "Appendix")*, Volume I, p. 236]. He watched the vehicle turn right into the common road serving the building he was checking; drive into the parking lot of the Grape Vine Restaurant/ Texas Spirit Saloon; begin to turn left toward him, *blinding him briefly with its headlights;* and then strike the front steps and support of the building [TR 60, *Appendix*, Volume I, p. 239]. The vehicle continued its turn and drove into the parking lot where it finally came to a stop. Officer Robinson had an unobstructed view of the vehicle and never lost sight of the vehicle from its operation on Commerce Avenue until it came to a stop in the flat, quiet expanse of the empty parking lot. He immediately approached the pickup truck and discovered the Petitioner, Ray Milton Pennington, the only occupant of the vehicle, behind the wheel. The officer saw the dome light of the vehicle come on for the first time when he opened the driver's door of Petitioner Pennington's vehicle. There were no other persons in the vehicle and no other persons in the area around the vehicle or leaving the area [TR 62-64 & 99-100, *Appendix*, Volume I, pp. 241-243, 278-279]. Pennington never gave any indication at the time of his arrest that anyone else had been driving his vehicle for him [TR 74-76, *Appendix*, Volume I, pp. 253-255].

Officer Robinson noticed an odor of alcoholic beverages about his person and asked Pennington to perform field sobriety tests, which the defendant substantially failed. Pennington was also given a preliminary breath test. As a result of this information, and the observations of Officer Robinson, Pennington was placed under arrest and charged with Driving Under the Influence, a *third or* subsequent offense within ten (10) years. Pennington agreed to take a breath test which showed a blood alcohol concentration of 0.19%. Neither of the citizen witnesses called by the prosecution, Kirk Kensy or Robert Bird, (who heard and felt the Petitioner's truck strike the building they occupied and who then immediately looked into the parking lot), observed any person other than Petitioner in or around the truck.

On October 21, 1997, the General District Court of Warren County, Virginia set this case for trial on November 19, 1997. At the subsequent trial, Pennington was represented by counsel and found guilty as charged. Pennington then appealed the matter to the Circuit Court. On January 9, 1998, the Circuit Court of Warren County, Virginia set this matter for trial before a misdemeanor *venire* on February 24, 1998. At the subsequent jury trial, the *venire* returned a verdict of guilty to the charge of Driving While Under the Influence, a third *or* subsequent offense within ten (10) years. After argument, including a statement made by defense counsel that if the defendant were given more than six (6) months in jail, he would not be eligible for work release [TR 250-251, 253-254, *Appendix*, Volume II, pp. 429-430, 432-433], the jury returned a sentence of six (6) months in jail and the maximum available fine of $2,500.

At no time during trial did the defendant raise objection to the validity of his prior convictions [TR 137, *Appendix*, Volume II, p. 316]. The issue of validity was first raised orally at the first hearing on Pennington's first motion to set aside the verdict on June 1, 1998, only after retaining new counsel. [Letter opinion of trial judge, *Appendix*, Volume II, p. 81] Pennington's objection was then noted in his supplemental motion to Pennington's second motion for a new trial, which was later argued on August 14, 1998.

On May 18, 1998, the trial court conducted a hearing on the Town's motion to quash Pennington's post-trial *Subpoena Duces Tecum* and granted the Town's motion for the reasons stated in the trial court's letter of May 18, 1998 [*Appendix*, Volume II, p. 63].

On October 27, 1998, the defendant was adjudicated guilty of the charge and sentenced. The court suspended adjudication and all penalties, including license suspension, pending appeal.

Petitioner was granted an appeal to the Court of Appeals of Virginia. On February 29, 2000 a panel of the Court of Appeals affirmed the decisions of the trial court. Petitioner's request for a rehearing *en banc* was denied.

Petitioner petitioned for appeal to the Supreme Court of Virginia which refused his petition on September 7, 2000; Petitioner's request for rehearing and "Motion of Appellant for Remand or for Dismissal" were denied on December 14, 2000.

Petitioner implies in his Statement of the Case that "Defendant's Statement of Facts To Supplement Transcript" was made a part of the record while it was in fact merely filed. Petitioner also implies that orders of the trial court were entered without affording Petitioner an opportunity to object when he was in fact given ten days from entry of the orders to raise objections in writing and failed to make such objections to the orders.

The Petitioner has failed to comply with Rule 5:11 (c) or 5A:8 (c) of the Rules of the Supreme Court of Virginia to make "Petitioner's Statement Of Facts To Supplement Transcript" part of the record. The "Petitioner's Statement Of Facts To Supplement Transcript" was filed December 28, 1998. A copy was mailed or delivered to opposing counsel but was not accompanied by notice that such statement will be presented to the trial judge on any date. The statement is not signed by the trial judge, Rule 5:11 (c) (2) or 5A:8 (c).

As a result of these errors, the Respondent was not afforded an opportunity to object to the statement on the ground that it is erroneous or incomplete.

The Petitioner failed to raise or preserve objections to the majority of the issues addressed by the Petitioner in his brief until after trial and the verdict of the jury. Attempts to correct such failures by a Statement of Facts were unsuccessful inasmuch as it was never presented to the trial judge for entry or signed by the trial judge. The orders of the trial court entered on January 4, 1999, [*Appendix*, p. 21, p. 38, p. 172, p. 174] each contained a paragraph stating:

> "The Clerk of this Court shall certify a copy of this Order to counsel upon entry. The Defendant shall have ten (10) days from the date of entry to file written objections to the form or content of this Order to the extent that the Defendant represents that it does not accurately represent the proceedings of the Court".

The Petitioner never filed any such objections to the orders.

WHY THE PETITION SHOULD BE DENIED

The Petitioner presents no important federal question. There has been no decision in this matter of any federal question by a state court of last resort in conflict with the decision of this Court or of a federal appellate court or of another state court of last resort. There is no indication that a lower court has departed from settled law, or has reached an issue of some national significance.

Petitioner challenges a Virginia drunk driving recidivist statute that, by its plain language and state judicial decisions interpreting said statute, creates enhanced penalties for subsequent offenses of drunk driving when a prior conviction, either within five or ten years of the current offense, is charged as an additional element to drunk driving and proved beyond a reasonable doubt. That this violates the "Petitioner's Fifth, Sixth and Fourteenth Amendment protections" is without basis. This is a well settled issue that has been decided contrary to Petitioner's position.

Petitioner asserts erroneous factual findings at trial. Petitioner asserts that no fair understanding of the prosecution's evidence could be considered to have proved each of the elements of the offense charged beyond a reasonable doubt. This assertion simply is not supported by any rational reading of the record.

Petitioner without any evidence or testimony placed in the record, or even offered to be placed in the record, during any prior judicial proceeding in this matter, and relying only on Petitioner's counsel's assertions in the petition, attempts to raise the issue of juror prejudice against the Petitioner during trial.

Petitioner states no special and important reasons for the grant of a writ of certiorari.

PRINCIPLES OF LAW, ARGUMENT AND AUTHORITIES

Petitioner's question 1:

May evidence of recidivism only be presented as a sentencing factor in a state criminal charge and not as an element of an offense enhancing the penalty of the underlying crime, proved to a jury beyond a reasonable doubt? And, may Petitioner raise the issue on appeal when no objection was made at trial to the admission of the prior convictions in evidence?

The Petitioner was convicted of driving while under the influence of alcohol, third offense within ten years in violation of Front Royal Town Code § 156-8. This Town ordinance incorporated by reference the statutes of the Commonwealth of Virginia criminalizing drunk driving

contained in Article 2 (§§ 18.2-266 through 18.273) of Chapter 7 of Title 18.2 of the Code of Virginia in effect on July 1, 1997, as permitted by Virginia Code § 46.2-1313 ["Ordinances enacted by local authorities pursuant to this chapter may incorporate appropriate provisions of this title, of Article 9 (§ 16.1-278 et seq.) of Chapter 11 of Title 16.1, and of Article 2 (§ 18.2-266 et seq.) of Chapter 7 of Title 18.2 into such ordinances by reference."]

At that time Virginia Code § 18.2-271(C) provided:

> If a person is tried on a process alleging a third or subsequent offense of violating § 18.2-266 or subsection A of § 46.2-341.24 within ten years of two other offenses for which the person was convicted, or found guilty in the case of a juvenile, under § 18.2-266, subsection A of § 46.2-341.24 or any valid county, city or town ordinance or law of any other state or of the United States substantially similar to § 18.2-266 or subsection A of § 46.2-341.24, and is convicted thereof, such person shall not be eligible for participation in a program pursuant to § 18.2-271.1 and shall have his license revoked as provided in subsection B of § 46.2-391. The court trying such case shall order the surrender of the driver's license of the person so convicted, to be disposed of in accordance with § 46.2-398, and shall notify such person that his license has been revoked indefinitely.

This clearly showed the legislative intent that to impose the enhanced penalties for driving while under the influence of alcohol after a prior conviction, the prior conviction must be proved as an element of that offense beyond a reasonable doubt, in other words, "tried on a process alleging a third or subsequent offense of violating

§ 18.2-266." The penalty provision noted by Petitioner, Virginia Code § 18.2-270, uses the language "Any person convicted of a second offense . . . " and "Any person convicted of a third or subsequent offense . . . " which clearly implies that a prior conviction must be charged as an element and proved beyond a reasonable doubt.

The Court of Appeals of Virginia, the highest court in the Commonwealth to consider the issue, in *FARMER v. COMMONWEALTH*, 10 Va. App. 175, 390 S.E.2d 775 (1990), *aff'd on reh'g*, 12 Va. App. 337, 404 S.E.2d 371 (1991) *(en banc)*, the Court upheld introduction of evidence of prior DUI convictions in the guilt phase of a bifurcated trial on charges of DUI as a third or subsequent offense saying: "We hold that evidence of prior DUI convictions does not constitute the 'traffic record' as contemplated by Code § 46.2-943 where the offense charged under Code § 18.2-266 is a subsequent offense of DUI punishable under Code § 18.2-270. We further hold that proof of such charge requires proof of the prior DUI convictions. For these reasons, the trial court did not err in admitting evidence of Farmer's prior DUI convictions independent of his prior traffic record during the guilt stage of the trial." *Id.* at 181.

At trial in the Warren County Circuit Court, the Petitioner did not object to the language of the warrant charging as an element 'After having been convicted or found guilty 2 times previously within the past 10 years of a prior offense as set forth in the last paragraph of 18.2-270", nor to the admission of the evidence of the prior convictions at trial on February 24, 1998 [TR 137;

Appendix, Volume II, p. 316]. An appropriate cautionary instruction was given to the jury regarding the evidence of prior convictions, without objection by the Petitioner [*Appendix*, Volume I, p. 12].

This Court in *SPENCER v. TEXAS*, 385 U.S. 554, 559-560 (1967), upheld the constitutionality of a Texas recidivist statute that required proof of a prior conviction during the guilt/innocence stage of a jury trial. That case remains good law and was reaffirmed in *MARSHALL v. LONBERGER*, 459 U.S. 422, 423 (1983):

> (c) Because respondent's prior conviction was valid, this case is controlled by *Spencer v. Texas*, 385 U.S. 554, which is reaffirmed. The Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules. The jury in respondent's trial was instructed to consider the prior conviction only in determining whether the specification was proved, and it is a "crucial assumption" of the jury trial system that juries will obey their instructions. Moreover, as recognized by the common law, any unfairness resulting from admitting prior convictions generally is balanced by their probative value. Pp. 438-439, n. 6.

Petitioner sites a number of cases in support of his position but they do not stand for the proposition asserted.

The issue in *ALMENDAREZ-TORRES v. UNITED STATES*, 523 U.S. 224, 228-229 (1998), was one of statutory interpretation inasmuch as the Court stated: "We therefore look to the statute before us and ask what Congress

intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment?"

The issue in *MONGE v. CALIFORNIA*, 524 U.S. 721, 734 (1998) was whether trial like procedural safeguards implemented by a state in sentencing proceedings compelled the extension of the double jeopardy bar.

The issue in *CASTILLO v. UNITED STATES*, 530 U.S. 120, 131 (2000) was also one of statutory interpretation, specifically whether words in a federal criminal statute create offense elements to be determined by a jury or sentencing factors to be determined by a judge.

In *APPRENDI v. NEW JERSEY*, 530 U.S. 466 (2000), the Court said "[t]he question presented [was] whether the Due Process Clause of the Fourteenth Amendment require[d] that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a [Slip Op. 2] reasonable doubt". This issue was decided affirmatively.

A similar result was reached in *UNITED STATES v. DAVIS*, 184 F.3d 366, 367 (4th Cir. 1999) where the Court stated: "If a fact is an offense element, it must be charged in the indictment and, if the defendant chooses to proceed to trial, it must be proven beyond a reasonable doubt. If, on the other hand, a fact is a mere sentencing consideration, it need not be raised until sentencing and need be proven only by a preponderance of the evidence."

In *JONES v. UNITED STATES*, 526 U.S. 227 (1999), the Court noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6. The Fourteenth Amendment commands the same answer in this case involving a state statute.

These cases cited by Petitioner address issues of federal statutory interpretation or situations where due process requires factors enhancing punishment in criminal matters be charged and proved beyond a reasonable doubt. None of those cases stand for the proposition that in a state criminal recidivist statute the fact of a prior conviction cannot be made an element of the offense and be required to be proved beyond a reasonable doubt.

Petitioner's question 2:

Did the evidence presented support the conviction of the offense charged beyond a reasonable doubt?

The trial record shows that the testimony of the prosecution witnesses did not conflict on any material issue. Petitioner has attempted to raise minor conflicts in time, distance, and position of participants that are readily explained by the different perspectives of witnesses and the effect of sudden events. Petitioner asserts that these immaterial conflicts in witness recollection somehow discredit the testimony of the arresting officer as to his uncontradicted testimony regarding his observations of the operation of a motor vehicle. Petitioner asserts that

those minor conflicts on immaterial details mean that the officer could not have observed a pickup truck owned by the petitioner drive off of a public road, into a private parking lot, strike the front steps of a building and come to a stop in the open and unobstructed expanse of a quiet parking lot. Petitioner further asserts that the officer could not say he never lost sight of the vehicle; that no one exited the vehicle; that he immediately approached the truck; that he found the Petitioner behind the wheel of the truck, the sole occupant and in an obviously intoxicated condition that was later confirmed by breath alcohol analysis because of these minor and immaterial inconsistencies.

Petitioner has tried to make a vague and casual statement by the arresting officer to witnesses at the scene as to where he was when Petitioner drove his truck into the steps of the building take on a specific, strained and unintended meaning that he was out of sight of events behind the building. Petitioner's interpretation of the statement is contrary to the arresting officer's explanation under oath as to what he meant and where he in fact was located. That sworn explanation was not contradicted by the observations of any other witnesses. The import of the officer's statement is not what Petitioner would like it to mean but rather what the officer in fact meant and testified to at trial, i.e., that he was around at the corner of the building in a position that allowed him to see all the relevant events.

The arresting officer did not know the defendant, and there is no indication on his part of bias or ill will.

The version of the events offered by witnesses for the prosecution and the defense at trial were diametrically opposed and the jury in evaluating the credibility of the witnesses simply found the testimony of the police officer more credible.

Petitioner's question 3:

May Petitioner raise the issue in this petition of alleged juror prejudice against the Petitioner at trial, without any evidence to support the assertion?

Petitioner has failed to offer or attempt to offer any form of evidence or testimony to support the assertions contained in the petition of juror prejudice in any judicial proceeding in this matter, other than counsel's assertions. Petitioner first made the allegation a year and a half after trial that the juror, David H. Catherman, was a convicted felon at the time he sat as foreman of the jury and that the juror bore ill will toward the Petitioner at the time of trial.

Virginia Code § 8.01-338 disqualifies persons convicted of a felony from serving as jurors. There is nothing to suggest that provision is intended to do other than protect the integrity of the justice system of the Commonwealth of Virginia. Petitioner has never offered a record of conviction certified pursuant to Virginia Code § 8.01-389 arising from the juror's felony arrest in the State of Georgia in 1978. Petitioner has not attempted to make the juror's response on the trial court's jury questionnaire a part of the record.

Petitioner had an opportunity to inquire of the jurors at trial during *voir dire* whether they may have been

convicted felons and did not. If the Petitioner had concerns such an inquiry could have prejudiced the jury against the petitioner, he could have requested the question be asked by the trial court and he did not. Any meaningful inquiry by counsel at trial has the potential to make jurors uncomfortable but that is simply part of the tactical decisions made by trial counsel. There is no indication anywhere in the record that counsel for Petitioner looked at the juror questionnaires before or during trial. A reasonable inference would be that the Petitioner had no interest in any possible felony convictions of jurors until it became a last gasp effort to forestall his sentencing. The mere circumstance of a sitting juror's prior felony conviction does not suggest a circumstance that would probably cause injustice to the defendant in a criminal trial. It is only with the addition of the allegation of ill will and the supposed admission of the juror of consideration of evidence of Petitioner's prior convictions of drunk driving during deliberations, contrary to the trial court's instruction, for a purpose other than proof of the element of prior conviction to support a subsequent offense charge, that the appearance of a significant issue is created.

If the juror in fact bore such ill will toward the Petitioner, it would seem incredible that the Petitioner would not have recognized the juror at trial and even more incredible that if the juror bore such ill will toward the Petitioner that he would confide his alleged felony conviction to his supposed enemy during some apparently amicable conversation. The Petitioner's allegations in the portion of the petition regarding "Juror Irregularities" implies that Petitioner approached the juror at

his home while on bond pending appeal and the juror that bore such exceptional ill will toward Petitioner promptly confessed to him that he was a convicted felon, wanted to cause him harm and had ignored the trial court's instructions during deliberations. Petitioner fails to explain the motive for the jurors' ill will to the Petitioner.

The transcript of the trial proceedings (TR 13-20) show the juror's sworn response to the trial judges' questions during *voir dire*: "Are any of you related to the Defendant, Mr. Pennington, by blood or by marriage, or do you otherwise know the Defendant?", negative response from the juror. "Anybody else who knows Mr. Pennington?", negative response from the juror. In other inquiries by the trial judge as to whether any juror had information about Pennington the juror's response was negative; whether he had an opinion about Pennington's guilt, negative response; was he sensible of any bias or prejudice against Pennington, negative response.

There is nothing in the record for the Court to review in support of the Petitioner's bare allegations in the petition of jury irregularities.

CONCLUSION

The plain error doctrine does not apply where there is no error. Making a prior conviction an element of the offense in a recidivist statute is constitutionally permissible and well settled law. The evidence before the jury supported the finding of guilt. The allegations of jury

irregularities are unsupported by any evidence or testimony and contrary evidence is shown in the record of the jury *voir dire* by the trial court.

Respondent requests the petition for writ of certiorari be denied.

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